

Children's National Medical Center and District of Columbia Nurses Association a/w American Nurses Association. Cases 5-CA-24632, 5-CA-24789, 5-CA-25027, 5-CA-25163, and 5-CA-25471

September 13, 1996

ORDER DENYING MOTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On November 9, 1995, the Acting Regional Director for Region 5 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing alleging that the Respondent had violated Section 8(a)(1) and (3) by engaging in certain acts, including discharging employee Martha Jewett (Case 5-CA-25027). Previously, on March 31, 1995, the Regional Director had dismissed the charge relating to Jewett's July 26, 1994 discharge, but on May 18, 1995, while an appeal of the dismissal was pending before the Office of Appeals of the General Counsel, the Regional Director revoked his dismissal of the charge based on a review of the appeal. The Acting Regional Director then issued the consolidated complaint.

On July 31, 1996, the Respondent filed a Motion for Partial Summary Judgment, or in the Alternative, Dismissal, together with a memorandum in support. The Respondent asserts that the allegation concerning Jewett's discharge should be dismissed on the grounds that: (a) under *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd. 785 F.2d 304 (4th Cir. 1986), the Regional Director lacked the authority to reinstate the charge because the conduct occurred more than 6 months prior to the reinstatement and was thus outside the 6-month limitations period of Section 10(b); (b) there is no provision in the Board's Rules for reinstatement by a Regional Director of a dismissed charge while an appeal of the dismissal is pending with the General Counsel; (c) the Board's Casehandling Manual (Part One) Unfair Labor Practice Proceedings, section 10122.7 requires a Regional Director to obtain authorization from the Division of Advice before reinstating a charge if the 10(b) period has expired; and (d) the Regional Director's actions were contrary to fundamental concepts of fair play and due process.

Counsel for the General Counsel, in an opposition brief, contends that the Regional Director's decision to revoke his dismissal of the charge was proper because an appeal of the dismissal was pending, reinstatement of the charge by the General Counsel on that appeal

would not be time-barred and, therefore, the same action by the Regional Director, the General Counsel's agent, is also not time-barred. The Respondent filed a reply memorandum.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we find that the Regional Director's reinstatement of the charge while an appeal of the dismissal of the charge was pending before the General Counsel was proper and consistent with longstanding practice and in accord with *Ducane Heating Corp.*, supra. In *Ducane*, the Board dismissed, on 10(b) grounds, an allegation concerning the suspension of an employee. The Board noted that while the charge was timely filed, "it was thereafter dismissed by the Regional Director, and no appeal from this dismissal was ever filed." 273 NLRB at 1390 (emphasis added). The Board found that the charge had been disposed of and, in effect, ceased to exist. In contrast, the Board in *Ducane* did not find a complaint allegation involving a layoff time-barred where the Regional Director had initially dismissed the charge, the General Counsel had denied the union's appeal, and a motion for reconsideration was pending before the General Counsel when the complaint alleging the layoff violation issued (273 NLRB 1389-1390). Thus, the Board effectively held that until a charge is finally disposed of, it continues to exist.

As indicated above, here a timely appeal of a Regional Director's dismissal of a charge under Section 102.19 of the Board's Rules was pending, and the Regional Director in effect reversed himself while the appeal was pending. In these circumstances, we find, based on a logical interpretation of the Rules, that the charge may be reinstated without violating the 10(b) statute of limitations proviso.¹ Accordingly,

It is ordered that the Respondent's Motion for Partial Summary Judgment or in the Alternative, Dismissal, is denied and the matter is remanded to the Regional Director for Region 5 for further appropriate action.

¹ With respect to the Respondent's contention that the NLRB Casehandling Manual (Part One) ULP, sec. 10122.7 requires the Regional Director to obtain authorization from the Division of Advice prior to reinstating a dismissed charge, we note that the Casehandling Manual is not binding on the Board or the General Counsel, and, in practice, authorization from the Division of Advice has not been required while an appeal is pending. Moreover, the letter from the Office of Appeals closing the case on the basis of the Regional Director's withdrawing his dismissal of the charge, indicates ratification by the General Counsel of the Regional Director's action.